

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re: JDS UNIPHASE CORPORATION  
SECURITIES LITIGATION

No. C-02-1486 CW (EDL)

**ORDER GRANTING IN PART LEAD  
PLAINTIFF'S MOTION TO COMPEL  
LIMITED ADDITIONAL DISCOVERY**

This document relates to ALL ACTIONS

Lead Plaintiff seeks documents about Defendant Kalkhoven's and the individual JDSU Defendants' personal finances to rebut their assertion that the JDSU stock sales were part of a diversification strategy. To obtain relief from the discovery cut-off, Lead Plaintiff must show good cause for modification of the schedule. Fed. R. Civ. Proc. 16(b). The Court finds the matter suitable for decision without a hearing and grants in part Lead Plaintiff's motion for the reasons stated below.

Kalkhoven's expert, Wayne Guay, opined that Kalkhoven's stock sales were consistent with a strategy of investment diversification, as Kalkhoven was a "poorly diversified individual." Hart Decl., Ex. A (Guay Report) at 2-3. Professor Guay based this analysis on the assumption "that Mr. Kalkhoven's stock and option holdings in JDS Uniphase comprised a very large proportion of his personal wealth." *Id.* at 12. Kalkhoven argues that, in making that assumption, Professor Guay relied upon "the testimony of Mr. Kalkhoven and that of his stockbroker, Mr. Jeffrey Oster, who strongly encouraged Mr. Kalkhoven to diversify his holdings." Guay Rep., ¶ 22. Kalkhoven also argues that Lead Plaintiff is not entitled to discover material that was not used by Professor Guay in forming his expert opinion. Kalkhoven Opp. at 11. See Rule 26(a)(2)(B) (expert report shall

1 contain "the data or other information considered by the witness in forming the opinions").

2 In discovery, Lead Plaintiff sought "documents concerning the proceeds or use of proceeds  
3 from any sale of JDS securities." Hart Decl., Ex.B at 14 (Request for Production No. 45(d)).  
4 Kalkhoven refused to produce such documents on the grounds that, inter alia, they are not relevant  
5 and are subject to his right to privacy. Sundel Decl., Ex. A (Kalkhoven Response to RPDs). Lead  
6 Plaintiff has sufficiently shown that Kalkhoven has put his personal wealth and assets at issue,  
7 though he previously argued that his net worth was not at issue, and therefore not discoverable. See  
8 Hart Decl., Ex. C (Kalkhoven Opp. Mot. Compel) at 10. Although Kalkhoven argues that Professor  
9 Guay only assumed that his wealth was heavily weighted to JDSU stocks before the stock sales at  
10 issue, Lead Plaintiff is entitled to test this assumption. Kalkhoven's privacy interest in his financial  
11 records is modest compared to other privacy interests such as medical information or sexual history,  
12 and is outweighed by the need for discovery, as raised in Professor Guay's expert report.  
13 Furthermore, his privacy interest is sufficiently protected by the September 21, 2005 Order  
14 Regarding Confidentiality. Moreover, producing a limited set of financial records from a limited  
15 time period would not be unduly burdensome. Kalkhoven's relevance and privacy objections to  
16 Lead Plaintiff's Request No. 45(d) are therefore overruled.

17 The Court agrees with Defendants that a defense based on diversification strategy should not  
18 come as a surprise to Lead Plaintiff. Nonetheless, the Court concludes that Lead Plaintiff acted  
19 reasonably diligently by moving to compel documents about the individual Defendants' finances  
20 and, having been denied information about their net worth, choosing not to further move to compel  
21 financial documents based on its understanding of the Court's ruling (albeit this understanding was  
22 somewhat overbroad). See September 7, 2005 Order re: Lead Plaintiff's Motion to Compel (docket  
23 no. 342) (denying motion as to "documents related to net worth but without prejudice to deposition  
24 inquiries regarding spending.") Having established good cause to modify the discovery deadline,  
25 Lead Plaintiff is entitled to test Professor Guay's opinion that Kalkhoven's stock sales were  
26 consistent with investment diversification strategy and Professor Guay's assumption "that Mr.  
27 Kalkhoven's stock and option holdings in JDS Uniphase comprised a very large proportion of his  
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1 personal wealth.” Guay Rep., ¶ 22.

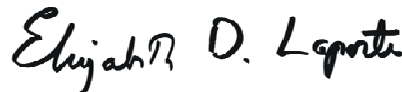
2 Lead Plaintiff’s motion for limited additional discovery is granted as to documents sufficient  
3 to show the use of proceeds from any sale of JDSU securities by Kalkhoven, and documents  
4 reflecting the total values of Kalkhoven’s JDSU portfolio compared to his non-JDSU stock portfolio  
5 and other investments during the relevant time period defined in Lead Plaintiff’s requests for  
6 production: January 1, 1999 to the date of the Guay report. Kalkhoven shall produce such  
7 documents to Lead Plaintiff by April 24, 2007. Lead Plaintiff’s motion to compel any other  
8 information about Kalkhoven’s personal finances is denied for insufficient showing of relevance to  
9 Kalkhoven’s purported diversification strategy.

10 Lead Plaintiff further moves to compel additional discovery of the individual JDSU  
11 Defendants’ financial transactions. The Court’s March 28, 2007 Order re: Defendants’ Motions to  
12 Strike Portions of the Seyhun Rebuttal Report struck the portions of the Guay Report addressing  
13 trading by the Defendants other than Kalkhoven. Lead Plaintiff’s motion is therefore denied without  
14 prejudice to the extent it seeks to compel financial records for Straus, Miller and Abbe, based on  
15 Defendants’ representations to the Court that their financial condition is not relevant to the issues in  
16 this action. See JDSU Defs Opp. Mot. Compel (docket no. 297) at 20.<sup>1</sup>

17 This Order disposes of docket number 984.

18 IT IS SO ORDERED.

19 Dated: April 10, 2007

  
ELIZABETH D. LAPORTE  
United States Magistrate Judge

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26 <sup>1</sup> Defense counsel has indicated, however, that the individual JDSU Defendants might  
27 testify that they sold JDSU stock to diversify their portfolios. JDSU Defs. Opp. at 3; Patz Decl., ¶ 2.  
28 The Court notes that such testimony could put the individuals’ financial transactions and investment  
portfolios at issue, and does not address whether that eventuality would justify further discovery or other  
steps.